Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD H. TATE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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350

QUESTION PRESENTED

IS UNLAWFUL COMMAND INFLUENCE INFECTING A COURT-MARTIAL'S POST-TRIAL PROCESS A STRUCTURAL DEFECT, AS DEFINED IN *ARIZONA v. FULMINANTE*, 499 U.S. 279 (1991)?

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No. 95-

RICHARD H. TATE, *Petitioner*,

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UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces,[1] *United States v. Tate*, No. 93-0018/NA (C.A.A.F. Jan. 16, 1996), is reprinted as Appendix A.

The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals,[2] *United States v. Tate*, No. 91 02074 (N.M. Ct. Crim. App. Apr. 11, 1995), is

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[1] The United States Court of Appeals for the Armed Forces was formerly known as the United States Court of Military Appeals. Petitioner will refer to the court by its name at the time of its opinion and order.

[2] The United States Navy-Marine Corps Court of Criminal Appeals was formerly known as the United States Navy-Marine Corps Court of Military Review. Petitioner will refer to the court by its name at the time of its opinion.

reprinted as Appendix B.

The order of the United States Court of Military Appeals, *United States v. Tate*, 37 M.J. 218 (C.M.A. 1993), is reprinted as Appendix C.

The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Tate*, No. 91 02074 (N.M.C.M.R. July 28, 1992), is reprinted as Appendix D.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the United States Navy-Marine Corps Court of Criminal Appeals on January 16, 1996. App. at 1a. 28 U.S.C. § 1259(3) provides jurisdiction in this case.

STATEMENT OF THE CASE

Petitioner pleaded guilty to two specifications of committing sodomy in violation of Article 125, Uniform Code of Military Justice [hereinafter U.C.M.J.], 10 U.S.C. § 925; one specification of falsely swearing to a statement, in violation of Article 134, U.C.M.J., 10 U.S.C. § 934; and one specification of taking indecent liberties with a child under sixteen years of age, also in violation of Article 134, U.C.M.J., 10 U.S.C. § 934. Petitioner was sentenced to confinement for twelve months, forfeiture of five hundred dollars pay per month for twelve months, reduction to the third lowest enlisted paygrade (E-3), and a bad-conduct discharge.

After trial, an accused may submit matters to the convening authority[3] for consideration with respect to the findings and the sentence. Article 60(b)(1), U.C.M.J., 10 U.S.C. § 860(b)(1). The convening authority must consider these matters before deciding whether to approve or disapprove the findings and sentence of the court-martial. Article 60(c)(2), U.C.M.J., 10 U.S.C. § 860(c)(2).

Petitioner attempted to obtain favorable comments from his military superior, Lieutenant [LT] Kramer, in order to have the convening authority consider them prior to taking his action. However, LT Kramer declined to provide Petitioner with a recommendation because he had been told, through his chain of command, specifically the Assistant Officer-in-Charge (the second-highest ranking member in the unit), that any further support for Petitioner would harm LT Kramer's chances for promotion and selection to an architectural registration program. Affidavit of LT Kramer (Dec. 21, 1992), App. at 14a. As a result of the command's unlawful influence on LT Kramer, Petitioner was discouraged from obtaining a clemency recommendation from LT Kramer **or anyone else** in his command. Declaration of Richard H. Tate (Aug. 6, 1993), App. at 19a. The convening authority was unaware of Petitioner's inability to obtain clemency recommendations. App. at 6a. The convening authority reduced Petitioner's confinement to six months based upon other unrelated clemency matters.

Upon review, the Navy-Marine Corps Court of Military Review affirmed the findings and sentence below.

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[3] The convening authority is the officer who creates, and sends specific charges to, a court-martial. Additionally, the convening authority has the power to approve or disapprove, for any or no reason, the findings and sentence of a court-martial and to grant clemency. Article 22, U.C.M.J., 10 U.S.C. § 822; Rule for Courts-Martial 601, Manual for Courts-Martial, United States (1995 edition). This immensely powerful position, with its unfettered degree of discretion, has no civilian counterpart.

App. at 11a. Before the Court of Military Appeals, Petitioner alleged that unlawful command influence deprived him of his post-trial rights when he was deprived of favorable comments from his military superiors in support of his clemency request. The Court of Military Appeals remanded the case to the Navy-Marine Corps Court of Military Review for consideration of the issue of unlawful command influence. App. at 9a. The Navy-Marine Corps Court of Criminal Appeals held that post-trial unlawful command influence was exerted in Appellant's case, but the resulting error was harmless. App. at 3a. The Court of Appeals for the Armed Forces summarily affirmed the lower court, holding that the lower court applied the correct standard when it concluded that the unlawful command influence was harmless beyond a reasonable doubt. App. at 1a. Judge Sullivan, dissenting, stated that the issue should not have been summarily affirmed, and that the court should have addressed the issue after a full appellate hearing, due to the importance of the issue of unlawful command influence, and the danger inherent therein, both to Petitioner and to the entire military justice system. App. at 2a.

REASON FOR GRANTING THE WRIT

UNLAWFUL COMMAND INFLUENCE INFECTING A COURT-MARTIAL'S POST-TRIAL PROCESS IS A STRUCTURAL DEFECT, AS DEFINED IN *ARIZONA v. FULMINANTE*, 499 U.S. 279 (1991).

Unlawful command influence is defined as "an attempt to coerce, or, by any unauthorized means, influence the action of a court-martial . . . or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts." Rule for Courts-Martial 104(a)(2), Manual for Courts-Martial, United States (1995 edition). Unlawful command influence is the "mortal enemy

of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987).

The lower court found that unlawful command influence infected the post-trial stages of Petitioner's court-martial, specifically, the convening authority's action. The convening authority's action is a critical stage in the military justice process as it finalizes military prosecutions. The convening authority has sole discretion to approve the findings and sentence of a court-martial in whole or part, or to disapprove them *in toto* for any reason. Article 60(c), U.C.M.J., 10 U.S.C. § 860(c). In taking action, the convening authority is required to consider any matters submitted by an accused. Article 60(c)(2), U.C.M.J., 10 U.S.C. § 860(c)(2). Such broad powers explain why the convening authority's action is such an important stage in the court-martial process and is the accused's "best hope for sentence relief." *United States v. Bono*, 26 M.J. 240, 243 n.3 (C.M.A. 1988).

Unlawful command influence deprives "servicemembers of their constitutional rights." *Thomas*, 22 M.J. at 393. In assessing this constitutional error, the lower courts applied the "harmless beyond a reasonable doubt" analysis. *See Thomas*, 22 M.J. at 393-94 (for unlawful command influence cases, Court of Military Appeals adopted this analysis based on *Chapman v. California*, 386 U.S. 18 (1967)). Petitioner contends that the lower court erred in using this analysis, because unlawful command influence is a structural defect in the constitution of the trial mechanism.

In *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), this Court divided constitutional errors into "trial errors" and "structural defects." Trial errors are subject to the *Chapman* constitutional harmless-error analysis; structural defects are not examined for prejudice, and require reversal in all cases. Structural defects are those defects "in the constitution of the trial mechanism." *Id.* at 309. As an analogy, specific facets of a trial may be seen as the building blocks of a house. The

foundation would consist of the following: the right to an impartial judge; the right to conflict-free counsel; the right to self-representation; the right to a public trial; the right to have an accurate reasonable doubt instruction; and the right to have a grand jury free of intentional exclusions of racial groups. If there is an infirmity in any part of this foundation, then the house must be rebuilt, regardless of the fact that the house still stands. The Constitution requires no less. *Tumey v. Ohio*, 273 U.S. 510 (1927) (a trial must have an impartial judge, regardless of the guilt of an accused); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (an indigent accused must be given an attorney); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (attorney must not have conflict of interest); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (violation of right to self-representation requires reversal, even though there is less prejudice when the right is violated); *Waller v. Georgia*, 467 U.S. 39 (1984) (accused guaranteed right to public trial despite lack of prejudice); *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993) (proper reasonable doubt instruction required, despite guilt); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (purposeful exclusion of a racial group from a grand jury requires reversal, regardless of prejudice). These parts of the foundation must exist, regardless of the charges, evidence, or defenses at trial.

In a military criminal prosecution (including the convening authority's action), there is another part of the foundation: the right to be free from unlawful command influence. Three factors support this contention.

First, the military is prone to unlawful command influence by the very nature of the command system, the rank structure, and the awesome and unique power associated with both. As a result, it is impossible to determine with any degree of reliability in what manner unlawful command influence has affected a prosecution. Specifically, Petitioner, once he learned of the unlawful command influence, was prevented from asking for recommendations from others who

may have aided his defense. The effects of the unlawful command influence in this case extend far beyond the absence of LT Kramer's recommendations; it resulted in an incomplete record and prevented the convening authority from considering highly favorable, credible, and relevant evidence. This is, therefore, a structural defect. *See Sullivan*, 113 S. Ct. at 2084 (REHNQUIST, C.J., concurring) (traits of structural errors include affecting composition of record and preventing jury from considering certain evidence).

Second, unlawful command influence unfairly prevented Petitioner from submitting clemency matters to the convening authority -- his best hope for relief. The Uniform Code of Military Justice provides for this right, and any infringement is fundamentally unfair. Article 60, U.C.M.J., 10 U.S.C. § 860; *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1723 (1993) (STEVENS, J., concurring) ("'[S]tructural' defects [are] those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding.").

Finally, the right to be free from unlawful command influence is at the very heart of the military justice system. *See generally* 95 Cong. Rec. 5718 (1949) (floor debate concerning U.C.M.J.; statement of Rep. Elston: Command influence involves one of the most fundamental issues in military justice). "Unlawful command influence undermines the integrity of the military justice system . . . ." *United States v. Weasler*, 43 M.J. 15, 16 (1995). Thus, like an intentional exclusion of a racial group from a grand jury, command influence in the military "strikes at the fundamental values of our judicial system and our society as a whole." *Vasquez*, 474 U.S. at 262 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). Like an intentional exclusion, unlawful command influence is "possible only under color of state authority, and wholly within the power of the State to prevent." *Vasquez*, 474 U.S. at 262. As a result, unlawful command influence is a structural defect.

In *Webb v. Texas*, 409 U.S. 95 (1972), this Court held that the judge's threatening remarks to a defense witness, which "drove the witness off the stand," deprived petitioner of due process, and this Court reversed. The dissenting opinion argued that this error should have been tested for prejudice. However, the defect in *Webb* was so egregious that this Court did not test for prejudice as it deprived petitioner of due process. Similarly, Petitioner has been deprived of his right to due process by the patently illegal conduct of members of his command which prevented the full exercise of his constitutional rights. Petitioner's witness was driven away from giving evidence, not at trial, but at an equally important stage of the court-martial process -- the review by the Convening Authority of clemency matters submitted prior to his taking action on the findings and sentence of the court-martial. This threat was not judicial in nature, but by a superior commissioned officer in LT Kramer's chain-of-command, with a clear threat of retribution for noncompliance. As in *Webb*, this Court should find that the use of the constitutional harmless-error standard is inappropriate, and as a result, the lower court erred in using this standard.

CONCLUSION

Petitioner's case presents a fundamental question of Constitutional law, and calls into question the fairness of the process by which Petitioner's findings and sentence are approved by the convening authority. "Unlawful command influence has been called a cancer of the military justice system . . . [l]ike cancer in a human body, this cancer in our system of justice will not go away by shutting our eyes to it." *Weasler*, 43 M.J. at 21-22 (Wiss, J., concurring in the result). This Court should grant certiorari to resolve this important question of constitutional law.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 93-0018/NA

Crim. App. No. 91-2074

United States, *Appellee*

v.

Richard H. TATE, Chief Builder
U.S. Navy, *Appellant*

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals dated April 11, 1995, and having carefully reviewed the entire record, we are satisfied that the court below applied the correct standard when it concluded that the unlawful command influence in this case was harmless beyond a reasonable doubt. We are further satisfied that the action taken in the decision below is sufficient as a matter of law. Accordingly, it is, by the Court, this 16th day of January, 1996,

ORDERED:

That said petition is hereby granted on the issue raised by appellate defense counsel in the Supplement filed on June 6, 1995; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals dated April 11, 1995, is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

SULLIVAN, Judge (dissenting):

I dissent. Although I might reach the same result as the majority in affirming this case, I would do so only after the command-influence issue advanced in this appeal received a full appellate hearing before this Court. In this case, the court below held as a matter of law that there was "unlawful command influence" but that this command influence was harmless. This is the type of case that our Court should closely examine in the light of a full appellate review in order to show the American public that the military justice system gives fair results without unlawful command influence.

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (SMITH)
Appellate Government Counsel (MARGOLIN)

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

ALBERT A. REED T.D. KEATING
T.B. HAMILTON

UNITED STATES

v.

Richard H. Tate, 540 64 0219
Chief Builder (E-7), U.S. Navy

NMCM 91 02074 Decided 11 April 1995

Sentence adjudged 4 April 1991. Military Judge: G.L. Wells. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Light Attack Wing, U.S. Pacific Fleet, Naval Air Station, Lemoore, CA.

LT MATTHEW KRONISCH, JAGC, USNR, Appellate Defense Counsel
LT NANETTE M. DeRENZI, JAGC, USN, Appellate Defense Counsel
LT MARGIE SAMPSON, JAGC, USNR, Appellate Defense Counsel
LT T.S. SUSANIN, JAGC, USNR, Appellate Government Counsel
CDR STEPHEN A. STALLINGS, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

This case was first decided by this Court on 28 July 1992. *United States v. Tate*, No. 91 2074 (N.M.C.M.R. 28 July 1992). While the case was awaiting further review by the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces), the appellant filed a series of affidavits with that Court raising the issue of unlawful command influence in the post-trial stage of the appellant's case. Based upon those affidavits, the Court of Military Appeals set aside this Court's opinion and remanded the case for further consideration. *United States v. Tate*, 37 M.J. 218 (C.M.A. 1993) (Order).

We have once again examined the record of trial, the original assignments of error,[1] the additional assignment of error filed as a result of the remand,[2] and the

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[1] I. THE MILITARY JUDGE'S POST-TRIAL COMMENTS REGARDING APPELLANT'S PUNITIVE DISCHARGE IMPEACHED THE SENTENCE.

II. THE CONVENING AUTHORITY'S ACTION MUST BE SET ASIDE BECAUSE THE STAFF JUDGE ADVOCATE FAILED TO COMMENT ON THE SIGNIFICANCE OF THE POST-TRIAL STATEMENTS OF THE MILITARY JUDGE.

[2] APPELLANT WAS PREJUDICED BECAUSE THE UNLAWFUL COMMAND INFLUENCE BY LIEUTENANT COMMANDER [H], THE ASSISTANT OFFICER IN CHARGE OF APPELLANT'S COMMAND, INTERFERED WITH APPELLANT'S RIGHT TO SUBMIT CLEMENCY MATTERS UNDER RULE FOR COURTS-MARTIAL 1105.

Government's replies thereto, and we have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

Pursuant to his pleas, the appellant was found guilty of committing fellatio and cunnilingus with his 10-year-old daughter, rubbing her vagina on separate occasions, and lying to the Naval Investigative Service when confronted about these offenses, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 934. The military judge, sitting as a general court-martial, sentenced the appellant to forfeitures of $500.00 pay per month for 12 months, confinement for 12 months, reduction to pay grade E-3, and a bad-conduct discharge. The convening authority [CA] approved the sentence as adjudged and, though not required to do so, suspended confinement in excess of 6 months for a period of 12 months.

We will consider the appellant's assignments of error *seriatim*. The first two deal with an allegation that the military judge impeached the sentence he adjudged. The following facts are pertinent in an analysis of this issue.

In a clemency petition, trial defense counsel alleged that the military judge, after the trial ended, said that he was "shocked" that the pretrial agreement did not provide for a suspended punitive discharge, that the command suspended both lengthy confinement and punitive discharges in nearly half the cases of this nature that he handled, and that the Navy would do itself and the appellant a disservice by allowing him to be discharged.

The staff judge advocate failed to address these alleged

statements in his advice to the convening authority. In an affidavit filed by the appellate government counsel and accepted by us in an earlier order, the military judge avers that while the conversation alleged by the trial defense counsel did occur, he has no specific recollection of it. The military judge also claims that the statements attributed to him are repeated out of context; that in many cases he has judged where the accused has lengthy and unblemished service and is admitted to the Family Advocacy Program [FAP], the command does suspend the discharge and lengthy confinement; that his surprise was that the appellant was not in FAP; and that he thought at the time that the sentence he awarded was lenient, and he continues to think so.

We find that the military judge awarded a sentence he believed to be appropriate, if lenient. Assignments of Error I and II are without merit. *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986); *cf. United States v. Hill*, 27 M.J. 293 (C.M.A. 1988).

In his additional assignment of error filed as a result of the remand, the appellant alleges that post-trial unlawful command influence was exerted in his case. We agree but find that the resulting error was harmless. The facts follow.

The appellant was frustrated in presenting certain clemency matters to the CA before the CA acted, when LCDR H, then the Assistant Officer-in-Charge of appellant's command, advised LT K, the appellant's immediate supervisor, to consider the extent of his support for the appellant. LT K, by way of a stipulation, was a willing and favorable witness for the appellant at trial. However, after his discussion with LCDR H, LT K refused

to provide any further clemency matter on the appellant's behalf, post-trial, because he was awaiting selection into a certain program and did not want to possibly jeopardize that selection.

LT K and LCDR H both viewed their discussion about LT K's participation in post-trial clemency as a personal, rather than a professional, matter. We, however, fail to see any distinction between a naval officer's personal and professional interests under these facts. The direct and predictable consequence of LCDR H's discussion with LT K was an interference with the appellant's opportunity to submit matters to the CA under Rule for Courts-Martial 1105(b)(4). The appellant has thus met his burden -- he has presented some evidence from which to draw a reasonable conclusion in favor of the allegation of command influence. *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). The Government has failed to show by clear and convincing evidence that command influence did not occur. Thus we conclude that unlawful command influence occurred when LT K failed to provide post-trial clemency matters as a result of his conversation with LCDR H. What remains to be determined is whether or not this Court is satisfied, beyond a reasonable doubt, that the findings and sentence are unaffected by the command influence. *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990).

We are so satisfied. The appellant's misconduct, referenced above, was egregious. The victim's psychological health was severely impaired. The offenses of which the appellant was convicted authorized a maximum sentence of 37 years confinement, reduction to pay grade E-1, total forfeiture of all pay and allowances,

and a dishonorable discharge.

The military judge awarded what he considered to be a lenient sentence of 12 months confinement, a bad-conduct discharge, and other ancillary punishments. The record of trial included LT K's and eight others' favorable, testimony on the appellant's character and service. The CA, after considering the staff judge advocate's recommendation, two written clemency petitions and an oral clemency presentation by the trial defense counsel, gratuitously suspended half the confinement adjudged.

We find the CA to have been fully aware of the appellant's character and his value to the naval service as well as his crimes and their effect on the victim. We find beyond any reasonable doubt that a clemency letter from LT K would not have affected the findings and sentence approved by the convening authority. *United States v. Stumbaugh* [sic], 36 M.J. 1180 (N.M.C.M.R. 1993).

Accordingly, the findings and sentence, as approved on review below, are affirmed.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 93-0018/NA

CMR. No. 91-2074

United States, *Appellee*

v.

Richard H. TATE, Chief Builder
U.S. Navy, *Appellant*

On consideration of appellant's motion to allow defense appellate Exhibits A and B, appellee's motion to remand case to the Navy-Marine Corps Court of Military Review and motion for enlargement of time, it is, by the Court, this 29th day of January, 1993,

ORDERED:

That the motion to allow appellate Exhibits A and B is hereby granted;

That the motion for enlargement of time is denied as moot;

That the motion to remand is hereby granted;

That the decision of the United States Navy-Marine Corps Court of Military Review is set aside; and

That the record of trial is hereby returned to the Judge Advocate General of the Navy for remand to the Court of

Military Review for further review.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (HYATT)
Appellate Government Counsel

APPENDIX D

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

JAMES E. ORR R.M. MOLLISON
T.B. HAMILTON

UNITED STATES

v.

Richard H. Tate, 540 64 0219
Chief Builder (E-7), U.S. Navy

NMCM 91 02074 Decided 28 July 1992

Sentence adjudged 4 April 1991. Military Judge: George L. Wells. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Light Attack Wing, U.S. Pacific Fleet, Naval Air Station, Lemoore, CA.

LT NANETTE M. DeRENZI, JAGC, USN, Appellate Defense Counsel
LT MATTHEW KRONISCH, JAGC, USNR, Appellate Defense Counsel
LT T.S. SUSANIN, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

Pursuant to his pleas, appellant was found guilty of committing fellatio and cunnilingus with his 10-year-old daughter, rubbing her vagina on separate occasions, and

lying to the Naval Investigative Service when confronted, in violation of Articles 125 and 134, Uniform Code of Military Justice. The military judge, sitting as a general court-martial, sentenced appellant to forfeit $500.00 pay per month for 12 months, to be confined for 12 months, to be reduced to E-3 and to receive a bad-conduct discharge. In a clemency petition, trial defense counsel alleged that the military judge, after the trial ended, said that he was "shocked" that the pretrial agreement didn't provide for suspending the punitive discharge, that the command suspended both lengthy confinement and punitive discharge in nearly half the cases of this nature that he handled, and that the Navy would do itself and appellant a disservice by allowing him to be discharged. The staff judge advocate failed to address these alleged statements in his advice to the convening authority. In an affidavit filed by appellate government counsel and accepted by us in an earlier order, the military judge avers that while the conversation alleged by trial defense counsel did occur, he has no specific recollection of it. The military judge also claims that the statements attributed to him are repeated out of context; that in many cases he has handled where the accused has lengthy and unblemished service and is admitted to the Family Advocacy Program (FAP), the command does suspend the discharge and lengthy confinement; that his surprise was that appellant was not in the FAP; and that he thought at the time that the sentence he awarded was lenient, and he continues to think so. The convening authority approved the sentence as adjudged and though not required to do so, suspended confinement in excess of 6 months for a period of 12 months.

We find that the military judge awarded a sentence he believed to be appropriate, if lenient. The assignments of error are without merit. *United States v. Scott*, 21 M.J.

345 (C.M.A. 1986); *cf. United States v. Hill*, 27 M.J. 293 (C.M.A. 1988). Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

APPENDIX E

AFFIDAVIT

I, Richard Kramer, USN, the affiant whose name is signed below, having first been duly sworn and being of sound mind and memory, do voluntarily, without coercion, and of my own free will, do depose and say as follows:

I am a Lieutenant in the Navy Civil Engineer Corps and that I was Builder Chief Richard Tate's direct supervisor while he served at Naval Air Station, Fallon, Nevada.

It is true that I agreed to testify for Chief Tate at his court-martial but did not due to some formality. However a stipulation of expected testimony was prepared which nearly accurately reflects what my testimony would have been.

After BUC Tate's sentencing my direct supervisor, LCDR William Hoppe advised me to consider the extent of my support for BUC Tate. I did not interpret his statement as a directive from my chain of command, however I did think that somehow the issue could have an impact on my career.

Soon after this conversation, Diane Tate contacted me and asked me to write a letter of clemency in support of BUC Tate. I told her I could not write the letter at the time because I was concerned about getting into a selective program to receive architectural registration. However, I did not tell her I would never write a letter in support of BUC Tate. Diane Tate did not ask me to provide the letter again.

In early November, 1992 I was contacted by BUC Tate's attorney Mr. Dan Hyatt. In my conversation with Mr. Hyatt I explained that I was concerned about the ramifications of my support for BUC Tate and that they were partially based on discussions I had with LCDR Hoppe. I refused to give LCDR Hoppe's name to Mr. Hyatt because I wanted to talk to LCDR Hoppe first. I did agree to allow Mr. Hyatt to prepare an affidavit for my review and signature.

I did not sign the affidavit prepared by Mr. Hyatt because the wording in it implied that I was being threatened by my command if I supported BUC Tate. This was not true. I knew I could write the letter of clemency without repercussions from my chain of command. My concern was that it could somehow have a negative impact on my career. I contacted LCDR Hoppe to clarify the intent of the discussion he had with me. LCDR Hoppe affirmed that the advice he gave me was personal advice. Specifically, that I did not owe BUC Tate any further support and that I should consider how supporting him would affect me personally, but not professionally. He apologized for any misinterpretations I may have made and further stated that he did not think my career was in any way at risk. I responded to Mr. Hyatt with the attached letter dated November 20, 1992.

LCDR Stallings of the Appellate Government Division in Washington provided me copies of affidavits signed by Diane Tate and Mr. Hyatt. I have read these affidavits and find that Mrs. Tate's statements regarding the situation with me are true with the exception that I did not state I would not write a letter of clemency even if I did get accepted for the Architectural Development Program. If I would have been asked again, I would have contacted

LCDR Hoppe and would have in all likelihood provided the letter of clemency. The letter of clemency would not, however, have added anything more than that stated in my stipulation of expected testimony.

In response to Mr. Hyatt's affidavit regarding our telephone conversation, I find it to be inaccurate. First of all, I did not tell him that I was directed nor warned by my superiors to not help BUC Tate. I merely told him that I still had some concerns for my career. Second, I did not tell him I would have written a letter for BUC Tate if I had not been warned by my superiors. Third, I told him I would have to look at the affidavit before I signed it, but I did not give the reason he stated. The reason would have been based on its accuracy. Fourth, I did respond to Mr. Hyatt's affidavit request with the attached letter.

In summary, it is true that I did not write a letter of clemency due to concerns for my career. It is true that this decision was partially based on a statement made by LCDR Hoppe, however, I did not interpret the statement as a warning or an order. Finally, it is true that I misinterpreted his statement to believe that supporting BUC Tate could have a negative impact on my career.

Dated: 21 December 1992.

Signed: /s/ [Richard A. Kramer]

WITH THE UNITED STATES ARMED FORCES
AT NAVAL LEGAL SERVICE OFFICE, SAN
DIEGO, CALIFORNIA

I, William H. Meyer, the undersigned officer, do hereby certify that on this twenty-first day of December, 1992,

before me personally appeared Richard A. Kramer, who is known to me to be a U.S. Armed Forces member on active duty, and to be the identical person who is described in, whose name is subscribed to, and who signed and executed the forgoing instrument, having first made known to him the contents thereof, he personally acknowledged to me that he signed the same on the date it bears, as his true, free and voluntary act and deed, for uses, purposed, and considerations therein set forth. And I do further certify that I am at the date of this certificate a Judge Advocate under authority granted to me by Article 36, Uniform Code of Military Justice, Title 10, U.S. Code Section 936, the Manual of the Judge Advocate General, Sections 2502 and 2503, and California Civil Code 1183.5.

/s/
WILLIAM H. MEYER
Lieutenant
Judge Advocate General's Corps
United States Naval Reserve

APPENDIX F

DECLARATION OF BUILDER CHIEF PETTY OFFICER RICHARD H. TATE

I, Richard H. Tate declare that:

1. During my incarceration at the Naval Consolidated Brig in San Diego, California, I called Lieutenant Krammer to request help in preparing my clemency package. I wanted Lieutenant Krammer to write a clemency recommendation for me. I also wanted to know if Lieutenant Krammer provided any input for my final enlisted performance evaluation.

2. Lieutenant Krammer said that he did not provide any input for my evaluation, and that he could not provide me with a clemency recommendation because he had been told by the chain of command that any further support for me would harm his chances for promotion and for selection to a special program. Lieutenant Krammer stated that if he was not selected for the program, he would gladly write a letter on my behalf.

3. Although Lieutenant Krammer asked me not to tell anyone about our conversation, I told my wife who then called and talked to Lieutenant Krammer. Lieutenant Krammer told her basically the same things that he told me. My wife provided my civilian defense attorney, Dan Hyatt, with a sworn statement detailing her conversation with Lieutenant Krammer.

4. After our initial conversation, I never again asked Lieutenant Krammer to provide me with a clemency

recommendation. I did not want to put his career in jeopardy, and I needed his recommendation by a certain deadline in order to submit it to the new convening authority.

5. My conversation with Lieutenant Krammer discouraged me from asking anyone else in the command for letters of clemency on my behalf.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct. Executed on this 6 day of August 1993.

/s/
RICHARD H. TATE
BUC, USN
Appellant